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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-905

J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility,

*Petitioner,*

*against*

PASQUALE DELLE ROSE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT REQUIRED

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Petitioner prays that a writ of ceritorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Pasquale Delle Rose* v. *LaVallee,* which was decided on October 27, 1972.

### Opinions Below

The decision of the Court of Appeals which petitioner seeks to review is not yet reported. It is reproduced in the appendix at page 29. The decision of the United States District Court for the Southern District of New York, which was affirmed by the Court of Appeals is reported at 342 F. Supp. 567. It is reproduced in the appendix at page 38. The decision of the District Court ordering an evidentiary hearing is not reported, and is reproduced in

the appendix at page 54. The decision of the Supreme Court, Bronx County, upholding the voluntariness of respondent's confession, is not reported. It is reproduced in the appendix at page 56.

## Jurisdiction

The decision of the Court of Appeals was rendered on October 27, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether the "completely erroneous rule" is applicable to the review by the Court of Appeals of the action of the District Court under 28 U.S.C. § 2254(d), granting respondent's petition for habeas corpus?
2. Whether in view of the mandate of 28 U.S.C. § 2254(d), the District Court, concluding that the state court findings were inadequate, in effect nullified the congressional directive therein that the state court determination made after a full hearing "evidenced by a written finding, written opinion or other reliable and adequate written indicia" shall be presumed to be correct?

## Statute Involved

28 U.S.C. § 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and

adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adquate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs

numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

## Statement of the Case

### A. Procedural Background

Respondent Delle Rose was convicted of murder in the first degree for the slaying of his wife by the Supreme Court, Bronx County, after a jury trial, and was sentenced to life imprisonment on July 10, 1964. While respondent's appeal was pending, and before any determination was made on the merits, the Appellate Division, First Department remanded the case for a voluntariness hearing pursuant to *People* v. *Huntley*, 15 N Y 2d 72. This was necessary because respondent's trial had been completed before the decision of this Court in *Jackson* v. *Denno*, 378 U.S. 368 (1964).

A *Huntley* hearing was conducted by the state court on May 22, 1968. The critical issue at the hearing, and at the trial, was whether two confessions made by respondent on the night of the crime were voluntary. On this score the state judge had already heard extensive testimony at the trial (in the presence of the jury) on respondent's mental state and on the events surrounding the making of the confessions. At the *Huntley* hearing respondent offered additional testimony concerning the disputed events, and the prosecution relied on the previously recorded testimony of its witnesses at trial.

On October 15, 1968 the state judge rendered a written decision holding respondent's confessions voluntary and

admissible at trial. The state judge summarized the testimony at the trial and the testimony at the hearing, and then stated the following conclusion:

> "On all the evidence, both at the trial and at the hearing, and after considering the totality of circumstances, including the omission to warn defendant of his right to counsel, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trial which was concluded by verdict on May 1, 1964 and by sentence on July 10, 1964," (Appendix, p. 62).

**B. Federal Court Proceedings**

Respondent commenced the instant proceeding in the Southern District of New York in November, 1971. Respondent made two claims in his application: (1) his incriminating statements, which were introduced at trial, did not meet the proper requirements of voluntariness and reliability; (2) the state judge who decided the issue of voluntariness against him after a *Huntley* hearing was prejudiced by his prior impressions during the trial.

The District Court decided that an evidentiary hearing on respondent's voluntariness claim would be appropriate because the state judge had not made what the District Court believed to be adequate findings of the historical facts surrounding the voluntariness claim, and had not indicated how far he had credited respondent's testimony in the state proceedings. The District Court stated that it could not conscientiously join in the trial judge's conclusions about voluntariness if it were to find the facts to have been as respondent's testimony portrayed them. Accordingly, the District Court believed that there had been no "adequate" determination pursuant to 28 U.S.C. § 2254(d) to relieve the court of its obligation to hear respondent's constitutional claims (App. 55).

On March 15, 1972 an evidentiary hearing was conducted by the District Court, at which respondent testified on his own behalf, and two police officers testified for the prosecution. In addition, the parties stipulated that if four witnesses who had previously testified at trial were to be called as witnesses, their testimony would be the same as their testimony in the state court.

On May 16, 1972 the District Court rendered a decision granting the writ of habeas corpus and ordering respondent's release from custody unless he was retried by the state within 30 days (see appendix, pp. 38-53). The District Court held that respondent's confessions were unconstitutionally received in evidence at trial because they were not the product of a deliberate, sentient and free choice. On May 23, 1972 the District Court stayed its decision pending a prompt appeal to the Court of Appeals by the State.

The State's appeal was heard by the Court of Appeals for the Second Circuit on September 14, 1972. On October 27, 1972 a majority of the Court affirmed the granting of the writ of habeas corpus by the District Court. Although the majority stated that they would not have made the same findings of fact on the cold record, it believed that they were bound to uphold the findings of the District Court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. The majority further stated that although they joined with the dissenting judge in regretting the release of respondent in this case, they believed that federal-state relations would be better served by reminding the state courts that they have only one opportunity to trigger the presumption of correctness under 28 U.S.C. § 2254(d). Accordingly they affirmed the release of respondent rather than remand the case for further proceedings in the state court.

The dissenting judge, Judge Lumbard, stated that the District Court should have been instructed to withhold the issuance of the writ for 30 days to enable the state court to

make more detailed findings of fact on the issue of voluntariness. Judge Lumbard said he believed that the District Court should not have held a hearing in light of the full hearing held by the state judge, until the state judge had time to clarify the doubts that respondent had raised about the findings that were made in the state court.

On November 20, 1972 the Court of Appeals issued a stay of its mandate pending an application for certiorari in this Court.

### C. Factual Background

It is undisputed that on the afternoon of March 9, 1963 respondent's wife was killed by a shotgun blast while she was parking the family car. It is also undisputed that respondent activated the murder device, which was located on the rear floor of the car behind the front seat. Whether respondent deliberately set this death trap and caused it to discharge, or whether respondent inadvertently triggered a strange object which had been set in place by an unknown assailant, was the critical issue which confronted the jury at respondent's trial.

Respondent maintained that he was innocent of any wrongdoing, and that any statements made by him to the contrary were extracted by overbearing tactics on the part of the police. The prosecution contended, primarily through two confessions of respondent, that respondent himself set the death trap and activated it when it failed to go off automatically. The jury believed respondent's confessions, but not his trial testimony, and found him guilty of murder in the first degree.

Respondent's version of the making of his confessions was essentially similar at the trial, at the *Huntley* hearing and at the evidentiary hearing in the District Court. Respondent's primary testimony was that his will was overborne by prolonged interrogation by police officers, by

being taken to view his wife's remains at the morgue, and by his general feeling of anguish at the death of his wife.

More particularly, respondent testified in the District Court that on the day in question he was taken to the police station in the late afternoon, after having been questioned for a short period of time at the scene of the crime. He acknowledged that he was permitted to sit with members of his family for a fifteen or twenty minute period, shortly after his arrival at the precinct.

He testified that he was then taken into a small room and questioned in close detail by groups of two or three detectives for a period of an hour or an hour and a half. Then he was taken to another room where an inspector questioned him for approximately 45 minutes. According to respondent, during both interrogations, he was asked to repeat his story over and over again.

Following these two interrogations, respondent conversed briefly with an assistant district attorney at 9 p.m., and discussed with him a recent back injury and a pending civil lawsuit. According to respondent, he indicated that he would like to have the assistance of his attorney in the civil matter, and the assistant district attorney purportedly replied, "You will have him. You will have him."

Respondent further testified that after this episode he was questioned in close detail by detectives for another hour, from 9 p.m. to 10 p.m. Then he was permitted to go to the bathroom, and permitted to sit for a few minutes with the parents of his late wife's girl friend, who were present at the precinct at that time. Then he was questioned again for about an hour or less, and during this questioning the inspector accused him of committing the crime, while other police officers induced him to confess. Respondent stated that during these interrogations he consistently asserted his innocence of any wrongdoing.

Following this fourth period of questioning, respondent was interviewed by two television newsmen for the late night news. Respondent said he spoke into the microphone and told the reporters what had happened during the day. After this interview respondent was taken into a squad room where he was permitted to sit with his mother-in-law for about ten or fifteen minutes. She was drinking a container of coffee and she gave him half.

Respondent further testified that during the course of the evening he experienced an increasing amount of pain from his recent back injury. However, he acknowledged that he did not ask his family or friends for medication or medical assistance, and he said he could not remember whether he asked the police for aspirin.

At about midnight, according to respondent's testimony, he was taken to the police garage to demonstrate what had occurred in his automobile, which had been brought there. Respondent testified that he was questioned there for about 45 minutes or an hour, during which time one detective threatened to beat him up, another detective placed his hand in the blood stained hole in the seat, caused by the shotgun blast; and all of the detectives grilled him while shining a bright light in his face from the front of the car.

Subsequently, respondent was brought back into the precinct at about 1 p.m., where, he claimed, the police offered to take him to the morgue to view the remains of his late wife, and he acquiesced. Respondent further testified that he had no recollection beyond this point, until he awoke the following morning and was taken to court.

Respondent acknowledged on cross-examination that except for the treatment he claimed to have received at the police garage, his overall treatment by the police was fair. He further admitted that members of his family and his in-laws knew his attorney in the civil lawsuit, but he did not ask them to seek the attorney's assistance. Respondent said that except for his bad back and occasional lapses of

memory, his health was good in 1963, when he was 27 years old, and that he regularly stayed awake each night until 1 A.M. in order to watch the late show on television.

Robert O'Neill, a New York City police detective, testified on behalf of the State at the evidentiary hearing in the District Court. He said that he questioned respondent intermittently at the scene of the crime, and then took him to the police station at about 5:30 P.M., where he was permitted to sit on a bench with members of his family. O'Neill said that the police then questioned respondent in an inner office to ascertain what had happened during the day, and afterwards he was again permitted to sit with his family.

O'Neill said that during the evening he spoke to respondent from time to time to get more details about the slaying, but the questioning was not continuous, and most of the time respondent was seated outside the railing of the squad room. O'Neill said that the police began to suspect respondent of committing the crime when all of their leads became exhausted, and "it just went back to Mr. Delle Rose." He said that they then took respondent to the police garage to re-enact the fatal events in his automobile, and they became more suspicious of respondent when it appeared that while seated in the front seat, he could not see an object on the rear floor of the car, as he had told the police during previous questioning. O'Neill said that at this time he accused respondent of committing the crime, but no one threatened respondent or grilled him with a lamp in his face.

After the incidents at the garage, respondent and the police returned to the precinct, where there was discussion about respondent viewing his wife's remains at the morgue. O'Neill could not remember who suggested the idea, but he recollected respondent saying, "If you let me go or something like that, I will tell you the truth." This was the first indication that respondent was willing to change his story.

O'Neill said that respondent was taken to the morgue by three detectives at about 1:30 A.M. He said he did not accompany respondent to view the body, but he conversed with respondent afterward in an outer office. He said that respondent explained where he bought the shotgun, where he sawed off the barrel and the stock, how he rigged the gun on the previous night by wiring the triggers to the front seat, and how he discharged the gun himself when it failed to go off by the motion of his wife moving the seat forward. O'Neill said that respondent was exacting as to facts, and appeared calm, lucid, and relieved to be getting things off his chest.

Following this confession at the morgue, the police brought respondent back to the police station, stopping on the way for hamburgers and coffee. O'Neill said that these were offered to respondent, but he could not remember whether respondent accepted them. At the precinct respondent was questioned again to pin down a few more facts, and then an assistant district attorney arrived at about 5 A.M. O'Neill said that the assistant district attorney subsequently took a question and answer confession from respondent with a stenographer present, and respondent appeared lucid and appeared to know what he was doing at the particular time.

O'Neill said that during the entire night, no one threatened respondent or had physical contact with him. O'Neill said that respondent did not ask for legal assistance, nor did the police offer any. He said that respondent complained of a bad back, but did not ask him for any medication.

Detective William Kaiser, another New York City police officer, also testified that respondent was questioned intermittently at the police station on the night in question. He said that most of the evening respondent was being interviewed as a witness to the crime rather than a suspect, and that in between questioning respondent was permitted to sit with his family and friends.

Kaiser also stated that no one threatened respondent at the police garage while respondent was asked to re-enact the fatal events in the automobile. He said that he became suspicious of respondent because respondent had to prop himself up in the front seat in order to touch a broom stick which the police had placed on the rear floor. This seemed to contradict respondent's previous story that he had noticed a strange object on the rear floor of the car, and had merely reached over to touch it when an explosion went off.

Kaiser said that when they returned to the precinct, respondent himself suggested that he would tell the truth if he was taken to the morgue to see the remains of his wife. Kaiser said that at the morgue respondent broke down and cried and kissed his wife and said, "I'm sorry." Then respondent told the police many of the details of the crime. Respondent was calm, lucid and composed while telling his story.

Kaiser also said that after the trip to the morgue, the police stopped for sandwiches and coffee on their way back to the police station. He too recollected that respondent had been offered food and drink, but could not remember whether respondent accepted any.

Upon returning to the precinct Kaiser went over respondent's story and made a thorough copy of the conversation. Then an assistant district attorney arrived and took a recorded statement from respondent. Respondent's condition appeared to be the same as it had been all day, which was nothing unusual as far as Kaiser could observe, except that respondent complained of his back hurting him.

In addition to this live testimony, the District Court also received in evidence the previously recorded testimony of four trial witnesses. The first, Assistant District Attorney Norman Mordkofsky, testified that respondent did not ask to see his lawyer, although his name was mentioned in connection with a civil lawsuit. Mordkofsky said that he did

not advise resopndent to consult with a lawyer or that he had a right to remain silent.

The second witness, Emil Messina, was a morgue attendant who overheard the making of respondent's first confession at the morgue. Messina said that respondent was walking very slowly, and that after viewing his wife's remains, he began to open up to the police after one of the police officers said to him in Italian that he would feel better if he got things off his chest. He said the police offered respondent a glass of a water and a cigarette, and told him to take it easy and to keep calm.

The third and fourth witnesses were Frank Cafaro, respondent's attorney in his civil lawsuit, and Arthur Jones, a court attendant. Cafaro testified that at the arraignment on the following morning, respondent did not recognize him. Jones said that respondent was very nervous during the taking of the pedigree, and had to be asked some questions twice. However, this was not the result of a language barrier because respondent apparently understood Jones' questions and answered them in English.

Based on this general state of facts, the trial judge ruled that respondent's admissions to the police and prosecutor were voluntary, whereas the District Court ruled that respondent's will was overborne.

## Reasons for Granting the Writ

**1. As a matter of law respondent's confessions should not have been held involuntary by the District Court. The Court below erred in affirming the decision of the District Court on the ground that the findings of fact were not clearly erroneous, since the primary issue before the Court was one of law and not fact.**

In *Neil* v. *Biggers,* 41 U.S.L. Week 4064 (December 6, 1972), this Court dealt with a procedural situation that was

substantially similar to the instant case. In *Neil* a district court had found a violation of a state prisoner's constitutional rights after an evidentiary hearing, and a court of appeals had affirmed the findings of the district court on the ground that they were not clearly erroneous. Nevertheless this Court determined that under the circumstances of that case, it would not be bound by its normal rule of practice, which is to defer to the findings of lower federal courts. As Mr. Justice Powell noted therein:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be 'confined' to two specific issues which we deem not controlling." (41 U.S.L. Week at 4066, n. 3).

In the instant case a district court has held on the basis of its own evidentiary hearing (which did not produce any facts that were not already established in the state court proceedings), that respondent's confessions were involuntary and inadmissible. A court of appeals has upheld the decision of the district court on the ground that the findings of the district judge were not clearly erroneous. Petitioner respectfully submits that this Court should undertake its own review of the state and federal court records to determine the constitutional significance to be attributed to the facts of this case.

Traditionally this Court has determined the voluntariness of a confession by examining the totality of facts and

circumstances surrounding the making of the confession, and has relied on certain critical factors in determining whether a defendant's will has been overborne by law enforcement officers. These factors include:

1. The age, intelligence and educational background of the defendant, and his ability to communicate with his interrogators. See e.g. *Gallegos* v. *Colorado,* 370 U.S. 49 (1962).

2. The time of day, duration and type of interrogation to which the defendant was subjected. See, e.g., *Clewis* v. *Texas,* 386 U.S. 707 (1967); *Davis* v. *North Carolina,* 384 U.S. 737 (1966).

3. The presence or absence of physically or psychologically abusive tactics, such as threats, beatings, or denial of food and sleep. See, e.g. *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968); *Payne* v. *Arkansas,* 356 U.S. 560 (1958).

4. The physical condition of the defendant. See, e.g. *Greenwald* v. *Wisconsin, supra.*

5. Whether the defendant was held incommunicado or had access to his family, friends or a lawyer. See, e.g. *Darwin* v. *Connecticut,* 391 U.S. 346 (1968).

6. Whether the defendant was advised of or aware of his legal rights. *Davis* v. *North Carolina, supra.*

7. Whether the police used deceptive practices to induce the defendant to confess. See, e.g. *Spano* v. *New York,* 360 U.S. 315 (1959); *Haynes* v. *Washington,* 373 U.S. 503 (1968).

Applying these principles to the instant case, it becomes clear that the treatment of respondent by the police, and the physical and mental condition of respondent prior to his confessions, does not present the type of circumstances which warranted the invalidation of his confessions on constitutional grounds by the courts below.

First, with regard to the age, mental capacity and educational ability of respondent, there was evidence that at the time of his arrest he was 27 years old, had been gainfully employed prior to his back injury, had been involved in civil litigation concerning his back injury, had engaged his civil attorney in the purchase of a parking lot, had been licensed to drive an automobile, and had, subsequent to his arrest and conviction, taught himself to read and write the English language at prison, where he reads novels, mysteries and law books. Bearing this in mind it becomes apparent that although respondent was poorly educated at the time of his arrest and did not speak English well, he nevertheless had a working knowledge of the English language and was possessed of an adequate degree of intelligence. Thus, respondent's case is a far cry from those of the illiterate or unintelligent defendants whose confessions have been set aside by the courts because of their tender age or limited mental capacity.

Secondly, with regard to the time of day, duration and type of interrogation to which respendent was subjected, his own testimony indicates that he was interrogated for no more than four and one-half hours, during the seven or eight hour period between his arrival at the precinct in the late afternoon, and his trip to the police garage at midnight. Furthermore, his testimony also indicates that when he was not being questioned by the police he was able to converse with an assistant district attorney about his civil lawsuit, able to be interviewed by television newsmen about the events of the afternoon, and able throughout the evening to converse with family members and friends who had come to the precinct to visit him.

With regard to the time of the first confession, which occurred at 1:30 A.M., it is noteworthy that this was only one-half hour after respondent's usual bedtime of 1 A.M. With regard to the second confession at 6 A.M., it should be noted that respondent claimed to have received a full

night's sleep on the two previous nights, and that he was a young man in good health, except for a bad back and occasional lapses of memory.

The third set of critical factors which this Court has looked to in determining whether a defendant's will has been overborne, is the presence or absence of coercive tactics by the police, such as lack of food and drink or lack of sleep or threats of violence. In this connection it is significant that respondent himself characterized his treatment by the police as fair, except for the purported threats at the police garage, which the police denied emphatically. With regard to food and drink, respondent admitted that he was not hungry during the night in question because he was feeling sick to his stomach, and it is undisputed that at some time between the first confession at the morgue and the second confession at the police station, the police officers stopped for food and drink and offered them to respondent.

With respect to the lateness of the hour and respondent being kept up all night, it should be recalled that in 1963 respondent was a young man, who normally kept late hours because he was not working, and who said he had full nights of sleep on the two nights preceding his arrest. Thus the lateness of the hour would not have had any serious effect on him in view of his age and his generally rested condition. Furthermore, respondent himself had no recollection of any events occurring after 1 A.M., and there is no evidence in the record that he was suffering from exhaustion when he made either of his confessions.

With regard to the fourth critical factor—the physical condition of the defendant—it is significant that although respondent complained of back pains during the night in question, he did not ask his family or friends for medication or a doctor, and could not remember whether he asked the police for aspirin. In addition, both police offi-

cers testified that respondent was calm and lucid during the making of his confessions, and appeared to be relieved to be getting things off his chest. Since respondent's testimony is silent in this regard, there was no support for the findings of the District Court, affirmed below, that respondent was racked with physical pain and psychological distress at the time he confessed, although undoubtedly he was experiencing some discomfort.

The fifth critical factor—whether respondent was held incommunicado or had access to family or friends—militates strongly against respondent. It is undisputed that at various times during the evening, respondent's family, friends and in-laws were present at the police station and were permitted to speak to him in between periods of questioning. Thus, one of the most objectionable factors in most confession cases—the isolation of the suspect from family and friends—was not present in the instant case.

With regard to the sixth critical factor—the awareness of legal rights—it is conceded on both sides that respondent was not advised of his rights by the police, and did not make any request for counsel except for one purported request to an assistant district attorney at about 9 p.m. While the District Court found that respondent made this request sufficiently clear so that the prosecutor, who "plainly" was not listening "intently" for such an expression, should have understood his wish for counsel (appendix at 46), we note that the prosecutor, who testified at trial but not before the District Court, stated that no such request had been made.

In addition, the District Court ignored the fact that respondent admittedly made no request for legal assistance from his family or friends, who were acquainted with his private attorney. In considering the absence of warnings, the presence of family and friends is significant because they could have suggested obtaining counsel if respondent so desired it. Also, it should be emphasized that the police

and the prosecutor had no obligation to advise respondent of his legal rights in 1963, since the decision of this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is not retroactive. See *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). While the absence of warnings is a factor to be considered, *Davis* v. *North Carolina, supra*, it is not a basis of itself for excluding a confession.

The seventh critical factor—the use of deception by the police in order to induce a confession—is not present in the instant case. While respondent testified that the police offered to have him speak to a priest or a relative, and told him that a judge would understand his predicament and release him on bail, there were no false promises or fraudulent inducementts to get respondent to confess. Compare, e.g. *Spano* v. *New York, supra; Haynes* v. *Washington, supra.* With regard to the trip to the morgue to view the remains of respondent's wife, both sides agree that the trip was made voluntarily, although it is not clear who suggested the idea.

In addition to these critical factors discussed above, there is another consideration which weighs heavily against the granting of the writ by the District Court and the affirmance by the Court of Appeals. As we have noted, respondent's recollection of the disputed events ends at about 1 A.M., just prior to the trip to the morgue. Whatever evidence there is concerning the subsequent events of that night and the making of the confessions, comes only from the police officers and not from respondent. It will be recalled that the police officers described respondent's condition as being calm, lucid and well aware of what was taking place. Indeed, many of the items of information contained in respondent's confession could only have come from him because he admittedly did not discuss many of the matters contained therein with the police during the course of the evening. Thus, there is no evidentiary support for the findings of the District Court

that respondent was a "helpless" man when he confessed, or that respondent was physically and mentally debilitated while he was being questioned during the early morning hours.

Bearing this final consideration in mind, and taking into account all of the evidence in its totality, we submit that the District Court erred as a matter of law in ruling the respondent's confessions were inadmissible at his state trial. We further submit that the Court of Appeals erred in upholding the ruling of the District Court on the ground that the findings of the District Judge were not clearly erroneous. The critical issue in this case is whether the use of respondent's confessions at trial violated the Constitution, and on this score there is not enough evidence to warrant the decisions below. The evidence shows that respondent was questioned intermittently at the police station for four and one-half hours during a period of eight hours; that respondent had access to family and friends who could have obtained legal assistance or medication for him if he so desired; that respondent was offered food and drink by the police, but declined; that respondent gave his first confession at an hour at which he was accustomed to being awake; that respondent was not beaten or physically mistreated in any other way; that respondent was intelligent and had a working knowledge of English; that respondent was relieved and calm when he made his confessions; and that respondent was supplying the police with information which only he knew.

We urge this Court to make its own review of the record in the state court and the record in the District Court, and to grant petitioner's application to review the erroneous decisions below.

**2. The District Court erred in conducting an evidentiary hearing and making independent findings on respondent's voluntariness claim because this claim**

**had already been rejected after extensive proceedings in the state court. The Court below should have reversed the decision granting the writ, or in the alternative directed the District Court to remand the case to the state court for more detailed findings of fact.**

While petitioner disagrees with the decisions of both lower courts on the merits and urges this Court to dismiss the writ of habeas corpus, petitioner also objects to the decision of the District Court to hold an evidentiary hearing and to make independent findings on respondent's voluntariness claim. In our view, such action was unnecessary because of the thoroughness with which respondent's claim was considered by the state court.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court established six criteria for the holding of evidentiary hearings by federal district courts in habeas corpus cases: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair hearing. (See 372 U.S. at 313.)

This Court also spoke of the discretion possessed by a district judge to receive evidence bearing on the applicant's constitutional claim, beyond the evidence already received by the state court, and this Court expressed its confidence that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not abuse that discretion. (372 U.S. at 318.)

In 1966 Congress amended the habeas corpus statute to reflect the procedural guidelines set down by *Townsend* v. *Sain*. See 28 U.S.C. § 2254(d). However, the amended statute differs from *Townsend* in certain important respects. The statute, unlike *Townsend*, speaks in terms of a presumption of correctness in state court determinations if they are evidenced by written findings or opinions and do not run afoul of eight procedural criteria set down by the statute. The statute also provides that if the state court determination does not violate any of these eight criteria, the burden shall be on the applicant to establish by convincing evidence that the factual determination of the state court was erroneous.

The more restrictive approach toward the habeas corpus applicant in the statute, in contrast to the more liberal approach in *Townsend*, is a reflection of the significant increase in habeas corpus cases during the three year interval between 1963 and 1966. Thus, the following language appears in the committee report which accompanies the Senate bill:

> "Although only a small number of these [habeas corpus] applications have been found meritorious, the applications in their totality have imposed a heavy burden on the Federal courts. In many instances the burden has been an unnecessary one, since the State prisoners have been filing applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application. The bill seeks to alleviate the unnecessary burden by introducing a greater degree of finality of judgments in habeas corpus proceedings." (Senate Report No. 1797 [1966]: 1966 U.S. Code Cong. and Admin. News 3664.)

In the instant case respondent's voluntariness claim was thoroughly litigated in the state courts. Respondent testi-

fied at trial and called various witnesses, including a psychiatrist, to support his contention that he was in a dazed and confused state of mind when he confessed to the murder of his wife. Since these proceedings prior to *Jackson* v. *Denno, supra,* had not been conducted out of the presence of the jury, respondent was given another opportunity to litigate the voluntariness issue at a *Huntley* hearing before the trial judge. At this hearing respondent gave additional testimony on his own behalf to clarify certain statements that he had made during trial. The prosecutor relied on the extensive testimony given by his witnesses at trial.

In a thorough opinion, the state judge, Justice Gellinoff, denied relief (appendix 56). The state judge summarized the evidence at the trial and the evidence at the *Huntley* hearing, and noted that at 9 P.M. on the night in question, respondent was not a suspect but was only giving information to the police. He further noted that respondent was taken to the morgue at his own request, that respondent had been given coffee by his mother-in-law and by the police, that respondent admitted that he did not feel hungry because he was not thinking about food, and that respondent admitted that the treatment of him by the police was "good".

In denying respondent's voluntariness claim, it is clear that the state court applied the correct legal standard:

> "On all the evidence, both at the trial and at the hearing, after considering the *totality of circumstances,* includng the omission to warn defendant of his right to counsel and his right against self-incrimination, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence . . ." (App. 62).

Having thus received careful consideration in the state court, respondent's voluntariness claim should not have

been the subject of an entirely new fact finding proceeding in the federal court. According to the District Court, the state court proceeding was not "adequate" because the trial judge did not make findings of historical facts from which the District Court could conclude how much weight was given to the opposing witnesses. However, as we have observed, the state judge noted in his opinion that respondent was not a suspect at 9 P.M., that he was taken to the morgue at his own request, that he received coffee and did not desire food, and that he admitted that his treatment by the police was good. Thus, it is clear that the state judge did not credit respondent's testimony that he was subjected to rentlentless questioning during the evening or that he was brought to the morgue (just prior to the first confession) at the instance of the police.

The hearing in the District Court did not produce any new evidence or remedy any procedural defect in the state court proceeding, but merely gave the District Court an opportunity to reassess the credibility of the witnesses contrary to the assessment of the state judge. While we recognize that there is nothing sacred about state court determinations, we submit that they should not be lightly set aside where they have been arrived at by procedurally adequate hearings and are supported by substantial evidence in the record. The action of the District Court in conducting an entirely unnecessary hearing was contrary to the spirit and purpose of Section 2254(d). This statute requires that a state court determination be evidenced by a written finding or opinion in order to benefit from the presumption of correctness. The opinion of the state judge more than satisfied this requirement.

Although we believe that the Court below should have reversed the District Court's decision without further proceedings, we would urge that at a minimum the Court below should have adopted the view expressed by dissenting Judge Lumbard, to the effect that the District Court should

have been directed to remand the case to the state court for more detailed findings of fact. As Judge Lumbard stated:

> "I would remand to the district court with instructions to withhold issuance of the writ for a period of thirty days to enable Justice Gellinoff to make further and more detailed findings of fact to support his conclusions that Delle Rose's confessions were voluntary. From the language used by Justice Gellinoff, it is abundantly clear that he believed the state's witnesses on the issue of voluntariness and did not credit Delle Rose. Of course it is true that the bare conclusion of voluntariness. without findings of fact, makes it possible that, with respect to conforming to the standards established by federal decisions, the trial judge's findings might be insufficient, or that his conclusions on the voluntariness issue might not follow from the findings. However, it seems unlikely that such an experienced and able trial judge was not fully aware of the applicable standard and that any elucidation by him would not set the matter at rest." (App. 33-34)

This approach of Judge Lumbard, while less preferable than an outright reversal of the District Court's decision as a matter of law, would nevertheless preserve harmony in delicate federal and state relationships. It would also be consistent with the congressional intent in 28 U.S.C. § 2254 (d), which was to give greater finality to state court proceedings.

In sum, the question as to the proper application of § 2254 (d) is a recurring one. (See, e.g., *Hill* v. *Nelson*, 466 F. 2d 1346 [9th Cir. 1972]). The action of the District Court in the instant case is illustrative of an insistence upon standards that are in excess of the congressional language. The statutory language speaks of a "written finding", "written opinion" or "other reliable and adequate written indicia."

The District Court confused this with a requirement for detailed findings of fact and conclusions of law, thus negating the evident intent of Congress that the language of the statute should be read hospitably rather than reluctantly toward state court decisions. See Senate Report No. 1797 (1966), *supra.* Read in the context of the statutory language *haec verba,* the District Court could not find any basis for directing a new hearing upon which substantially the same testimony as was before the state judge was presented. In view of the overriding purpose of Congress in enacting the statutory provision, the question presented here warrants plenary consideration.

## CONCLUSION

**The petition for certiorari should be granted in all respects.**

Dated: New York, New York, December 15, 1972.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
*Attorney for Petitioner*

Samuel A. Hirshowitz
First Assistant Attorney General

Hillel Hoffman
Assistant Attorney General
*of Counsel*

# APPENDIX

**Decision of Court of Appeals for the Second Circuit affirming the granting of respondent's petition for habeas corpus.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 113—September Term, 1972.

(Argued September 14, 1972 Decided October 27, 1972.)
Docket No. 72-1619

UNITED STATES OF AMERICA ex rel., PASQUALE DELLE ROSE,

*Petitioner-Appellee,*

v.

J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility,

*Respondent-Appellant.*

Before:

FRIENDLY, *Chief Judge,*
LUMBARD and FEINBERG, *Circuit Judges.*

FRIENDLY, *Chief Judge:*

We agree with the district judge that "This is a troublesome case." The State of New York asks us to reverse an order of the District Court for the Southern District of New York directing the release of Pasquale Delle Rose, sentenced to life imprisonment in 1964 for the premeditated murder of his wife, unless he is promptly retried without use of two confessions which the district court held to be involuntary. The issue of voluntariness had been decided adversely to petitioner in an unreported decision by Justice Gellinoff in the Supreme Court of New

York for Bronx County in 1968; his decision was unanimously affirmed by the Appellate Division, First Department, 33 A.D.2d 657 (1969), and the Court of Appeals, 27 N.Y.2d 882, 317 N.Y.S.2d 358, 265 N.E.2d 770 (1970); and *certiorari* was denied, 402 U.S. 913 (1971).

In Delle Rose's pre-*Jackson* v. *Denno* trial, the prosecution sought to prove and his confessions supported the following story: Delle Rose, consumed with jealousy, had determined to kill his wife and purchased a shotgun for that purpose. In the early morning of March 9, 1963, he placed the gun against the floor of the family car so that its muzzle pointed into the back of the driver's seat. Using a wire hanger and a length of cord, he then attached the gun to the driver's seat in such a manner that the triggers would be squeezed and the gun fired if the seat were pulled into a forward position. Knowing that his wife drove with the seat further forward than he did and that she was likely to use the car alone later in the morning, he awaited events. For reasons not explained, the device failed to operate, and Mrs. Delle Rose left and returned from a shopping trip without having suffered harm or having noticed the weapon. Soon after her return, the couple departed together on a joint errand, returning shortly thereafter. While his wife parked, Delle Rose reached behind her seat and activated the device manually, causing the gun to fire and kill her. The physical facts were consistent with Delle Rose's confessions.

At trial, Delle Rose denied that he had set or even knew of the device. His claim was that while looking behind to help his wife park he noticed for the first time a "brown paper bag" behind the driver's seat and inadvertently detonated the gun while exploring the "bag's" contents. Understandably unimpressed by this story, the jury chose to credit the confessions, which it presumably found to have

been voluntary. An appeal having been taken, the Appellate Division remanded for an evidentiary hearing on the voluntariness of the confessions pursuant to *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), before the trial judge. Justice Gellinoff, who had seen and heard Delle Rose both at the trial and at the Huntley hearing, ruled the confessions to have been voluntary; as noted, this ruling was unanimously affirmed at both levels of the New York appellate hierarchy.

What has caused the present imbroglio is that, as the district court permissibly ruled, the state judge did not make adequate findings after the *Huntley* hearing. In the court's words, he "reviewed the evidence, summarized petitioner's testimony, but neglected to say how far he credited—and to what extent, if any, he discounted or rejected —that testimony." Petitioner having thus established "that the merits of the factual dispute were not resolved in the State hearing," 28 U.S.C. § 2254(d)(1), a federal hearing was warranted and Delle Rose was relieved of the burden of establishing "by convincing evidence that the factual determination by the State court was erroneous." Choosing largely to credit the version of the circumstances of the confessions given by Delle Rose, who appeared before him, the district judge found the confessions to have been involuntary. As petitioner's counsel has strongly reminded us, these findings are now protected from full review on our part by the familiar provision of F.R.Civ.P. 52(a), applicable by virtue of F.R.Civ.P. 81(2):

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

If we must uphold the factual findings, as we think the Rule compels, although on the cold record we do not feel

we would have made them, compare *United States ex rel. Fitzgerald* v. *LaVallee,* 461 F.2d 601, 604 (2 Cir. 1972), we cannot fault the conclusion of involuntariness.

It is a matter of particular concern when a district court has directed release of a state prisoner convicted of serious crime because of the involuntariness of confessions[1] despite the considered and unanimous contrary view taken by thirteen New York judges who are quite as familiar as federal judges with the principles governing the admissibility of confessions and have displayed no hesitancy in applying them. Still, in abstract theory, we cannot tell in this instance whether the New York courts credited Delle Rose's story of the circumstances surrounding his confessions but still held these to have been voluntary, a conclusion to which we could not agree, or based their holding of voluntariness on a partial or complete rejection of his testimony, in which event the district judge would have been bound to deny the petition. The difficulty would have been avoided if the trial justice had made adequate findings or if one or the other of the New York appellate courts, discerning the inadequacy, had remanded for him to make specific findings with respect to credibility.

Our brother Lumbard suggests that the district judge should have given the New York courts a further opportunity to make credibility findings that would support the result reached in the *Huntley* hearing rather than rehear the matter himself and that, since he did not, we should now include the possibility of new *Huntley* findings by the state judge as an alternative condition of release. We might be inclined to do this but for the Supreme Court's summary reversal, 392 U.S. 647 (1968), of *United States ex rel. Singer* v. *Myers,* 384 F.2d 279 (3 Cir. 1967). See

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[1] The State represents that without the confessions it has little chance of obtaining a conviction so many years after the event.

also *United States ex rel. Gockley* v. *Myers*, 411 F.2d 216 (3 Cir. 1969). When the Supreme Court has approved release conditioned on a state's doing something less than a retrial or the hearing of an appeal, see *Jackson* v. *Denno*, 378 U.S. 368, 391-96 (1964), *Boles* v. *Stevenson*, 379 U.S. 43 (1964), but see *Roberts* v. *LaVallee*, 389 U.S. 40 (1967), this has been in cases where the state had failed to provide procedures sufficient to guarantee constitutionally protected rights, not where the procedures were sufficient and the petitioner has pursued them but the findings were inadequate. While we join in regretting the release of the petitioner in this case, federal-state relations may be better served in the long run by thus reminding the state courts that they have one, but only one, opportunity to make a determination that will trigger the presumption of correctness under 28 U.S.C. § 2254(d).

Despite our lack of enthusiasm for the result we are constrained to reach, we express appreciation to Allan Blumstein, Esq., for his devoted service to petitioner.

Affirmed.

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LUMBARD, *Circuit Judge* (dissenting):

I dissent. I would remand to the district court with instructions to withhold issuance of the writ for a period of thirty days to enable Justice Gellinoff to make further and more detailed findings of fact to support his conclusion that Delle Rose's confessions were voluntary. From the language used by Justice Gellinoff, it is abundantly clear that he believed the state's witnesses on the issue of voluntariness and did not credit Delle Rose. Of course, it is true that the bare conclusion of voluntariness, without findings of fact, makes it possible that, with respect to conforming to the standards established by federal decisions, the trial judge's findings might be insufficient, or that his conclusion on the voluntariness issue might not follow from

the findings. However, it seems unlikely that such an experienced and able trial judge was not fully aware of the applicable standard and that any elucidation by him would not set the matter at rest.

The state court, which had had a full hearing on the issue with ample presentation of testimony, should have been permitted to clarify its findings of fact on the relevant issue before the federal district court was put to the task of holding a second evidentiary hearing. There is some precedent for remitting a federal habeas corpus petitioner to the state courts for an evidentiary hearing to determine the facts that are relevant to his federal constitutional claims. See *Hart* v. *Eyman*, 458 F.2d 334, 338 (9th Cir. 1972); *Carter* v. *Eyman*, 265 F.Supp. 957 (D. Ariz. 1967). The majority notes that in *United States ex rel. Singer* v. *Meyer*, 384 F.2d 279 (3rd Cir. 1967), a case in which the Third Circuit remitted the petitioner to the state courts, the Supreme Court summarily reversed. See 392 U.S. 647 (1968). I do not feel, however, that this necessarily defeats the result that I would reach here. For the Court was there concerned with the exhaustion prerequisite to federal habeas corpus relief. The Third Circuit had vacated the issuance of the writ on exhaustion grounds because of the possibility that the petitioner could, pursuant to a state post-conviction statute, petition the state courts for an evidentiary hearing on the voluntariness issue. In summarily reversing, the Supreme Court cited *Roberts* v. *LaVallee*, 389 U.S. 40 (1967). In that case, the Court had said:

> In *Brown* v. *Allen*, 344 U.S. 443 (1953), we considered the statutory requirement, under 28 U.S.C. § 2254, that a petitioner exhaust his state remedies before applying for federal habeas corpus relief. We concluded that Congress had not intended "to require repetitious applications to state courts." 344 U.S., at

499, n. 3. We declined to rule that the mere possibility of a successful application to the state courts was sufficient to bar federal relief. pp. 42-3.

It is clear that the Court's reversal in *Singer* is inapposite here, for no one suggests that the writ should be denied for failure to exhaust state remedies. My objection is that the district court should not have held a hearing, in light of the full hearing held before Justice Gellinoff, until Justice Gellinoff had had an opportunity to clarify the doubts that petitioner has raised about the findings that were made in the state hearing. Before the district court held a second evidentiary hearing, it had to determine "that the merits of the factual dispute were not resolved at the State court hearing," 28 U.S.C. § 2254(d)(1), *Townsend v. Sain*, 372 U.S. 293, 313 (1963); for, otherwise, the state court findings were entitled to a presumption of correctness and the burden was on the petitioner to establish by convincing evidence that they were erroneous. 28 U.S.C. § 2254(d). It is my view that when the state court record is, at most, unclear, as it is here, the district court should permit the state court to clarify its findings before it determines whether the material facts were resolved in the state court hearing and proceeds with a new evidentiary hearing. This has nothing to do with the exhaustion requirement, which I concede to be met here, that concerned the Supreme Court in *Singer* and *Roberts*.

I believe that the federal courts should make every effort and provide every opportunity to allow the state courts to tie up the ribbons and amend and clarify their rulings so that their judgments may stand. As I have indicated, nothing in this approach seems to me to be inconsistent with the requirements of 28 U.S.C. § 2254(d). If the state courts, after having an opportunity to clarify their findings, fail to do so within a reasonable time, then

it may be proper for the federal district court to proceed with a new evidentiary hearing. Until the state courts have had this opportunity, however, the district court should not proceed with a new hearing on the issue.

My view of the proper resolution of this case is reinforced by the Supreme Court's language in *Townsend* v. *Sain, supra,* which was the precursor of revised § 2254. Chief Justice Warren, speaking for the Court, said:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing;
>
> . . . .
>
> If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.
>
> Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of

> state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied. Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession, pp. 313-15.

This language indicates to me that we might even be justified in holding, without the need for any clarification from the state court, that it was improper for the district judge to hold an evidentiary hearing. In any event, it indicates that the district court was in error in ignoring the prior hearing and determination by Justice Gellinoff on the voluntariness issue.

Here again, as in many hundreds of cases since *Fay* v. *Noia*, 372 U.S. 391 (1963), a federal district court is second-guessing numerous state court judges, who, as the majority concedes, are as familiar as federal judges with the standards governing the admissibility of confessions and have shown no unwillingness to apply them, and all of whom are agreed that the confessions were voluntary and the conviction was properly arrived at. As in many hundreds of cases since *Fay* v. *Noia*, federal court intervention threatens to free a man who, beyond any doubt, was guilty of the deliberate murder of his wife. It seems to me that a decent respect for the public interest, as well as for the state courts, requires us to stay our hand when, at most, the record seems equivocal.

**Decision of Frankel, D.J., Dated May 16, 1972, Granting Petitioner's Application for Habeas Corpus.**

OPINION.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

PRO SE

71 Civ. 5111

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UNITED STATES OF AMERICA ex rel. PASQUALE DELLE ROSE,
Petitioner,

—against—

J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility,
Respondent.

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Appearances:

ALLAN BLUMSTEIN, Esq., New York, New York, Attorney for Petitioner.

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for Respondent.

HILLEL HOFFMAN, Esq., Assistant Attorney General, of Counsel.

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FRANKEL, D.J.

Mrs. Gloria Delle Rose was murdered shortly before 1:00 p.m. on March 9, 1963, by means of what a prosecution witness described, without hyperbole, as a "diabolical scheme." The petitioner, who was her husband, was found by a jury

to have killed her, apparently because of raging jealousy over her supposed relationship with a former boyfriend. Sentenced to life imprisonment, he has now been confined for over nine years. He seeks the writ of habeas corpus on the ground that his confessions, comprising nearly all of the vital evidence against him, were not voluntary and rational, but were extracted in circumstances rendering unconstitutional their use in his trial. The ghastly facts of the crime, so far as they are now material, may be summarized as follows:

Petitioner had suffered a back injury in October 1962 which left him unable to work. He was scheduled on Saturday, March 9, 1963, to pick up his medical records from the office of a recently deceased physician who had been treating him and to deliver the records to another physician. On the morning of that day his wife, using their automobile, went to do some shopping, returning about 11:00 a.m. for their trip together for the medical records. With her driving, they went to the home of the late physician in City Island. They arrived back in their Bronx neighborhood somewhat over an hour later, planning to shop locally for some fabric she needed. She proceeded to park the car. Within a few minutes she was dead of gunshot wounds.

The foregoing chronology was not disputed. The heart of the grim controversy related to the question whether petitioner or someone else had rigged the device that caused Mrs. Delle Rose's death.

According to the prosecution's contentions, rested largely upon the confessions in issue, petitioner had purchased a shotgun with which to kill his wife when he became afflicted with jealousy. In the early morning hours of March 9, 1963, about 3:00 a.m. or so, he got out of bed and lodged the shotgun so that its muzzle pointed into the back of the driver's seat. Using a wire hanger and a length of

cord, he set the loaded weapon so that the triggers would be squeezed when the driver's seat was pulled forward from the position in which he left it. The plot rested upon his knowledge that his wife drove with the seat farther forward than he did.

On the morning of March 9, the confessions and the prosecution's story continued, after the couple had taken breakfast together, she left alone for her shopping trip. Petitioner opened a window and waited to hear the explosion signaling her death. But he was disappointed.

Then, to retrace the account given earlier, they went together to City Island and back to the Bronx. While Mrs. Delle Rose parked, petitioner reached behind her seat and accomplished what he had planned to happen automatically: he pulled the barrel forward, causing the weapon to fire and kill his wife.

Petitioner, who testified in his own defense, denied that he had set or known of the fatal mechanism. While his wife was parking, he claimed, he was turned sideways in the passenger seat, looking through the rear window to help guide her. He noticed a "brown paper bag" and "a mat that was along with it." He reached for this "lump," grabbed the mat to see what was under it, and then heard an explosion. He learned only afterwards the cause of the explosion and the fatal injuries to his wife.

With both the proof of his guilt and the assertion of innocence coming from petitioner's own mouth, the pretrial confessions were of undisputedly critical significance. There were two such accounts: one to police officers at the morgue, where petitioner had been taken to see his wife's body, at about 1:30 a.m.; the second taken by an assistant district attorney in question-and-answer form at about 6:00 a.m. Both were admitted over objections at the trial. Both are again questioned here.

*Decision of Frankel, D.J., Dated May 16, 1972, Granting Petitioner's Application for Habeas Corpus.*

The procedural setting, both in the state courts and this court, should be outlined to make clear the materials underlying the fact findings hereinafter recorded. While the circumstances attending the confessions were explored in the trial, there was no hearing or ruling in the jury's absence as required by the later decision in *Jackson* v. *Denno,* 378 U.S. 368 (1964). Accordingly, when petitioner appealed his conviction, the parties stipulated that the trial court should hold a *Huntley* hearing, the familiar New York procedure named for *People* v. *Huntley,* 15 N.Y.2d 72 (1965). For purposes of that hearing, the prosecution rested upon the trial record. Petitioner also relied upon the record, but took the witness stand to give supplementary testimony. The trial judge rendered a written decision. His opinion reviewed in separate installments the "trial testimony" and the "hearing testimony." As to the former, he said:

> "So far as the trial record is concerned, I find that both these confessions are voluntary and were legally admissible in evidence."

He then summarized the trial testimony on both sides, including defendant's assertions (contradicted by the police officers) that he was, in the long hours before confessing, "asked to put his hand in the back seat where the blood of his wife was; that the police threatened to beat him up if he did not admit he killed her; that he was compelled to say by the police that he had killed his wife but that what he meant was that he had done so inadvertently, by placing his hand over the lump; and that, after telling the officer he wanted to see his wife, he did not remember what happened thereafter until 9:00 o'clock in the morning." Similarly, the judge recited the trial testimony of a psychiatrist opining that when petitioner confessed he was so exhausted "he could say yes if you asked him if the moon were made of green cheese."

Although he included these sworn assertions at trial by petitioner and the physician, the trial judge did not state whether or to what extent he rejected any of them.

The opinion followed a similar course with respect to petitioner's *Huntley* hearing testimony. Again, there was a summary, this time in numbered and lettered paragraphs. Again, there was no statement as to how far, if at all, petitioner's account of the underlying historical facts was credited. Once more, taking all the evidence together, the judge recorded his conclusion that the confessions "were, in all respects, voluntary and legally admissible in evidence * * *."

With the record thus finally closed, petitioner pursued his appeals. The Appellate Division (33 A.D.2d 657) and the Court of Appeals (27 N.Y.2d 882) affirmed without opinion, in 1969 and late 1970, respectively. Certiorari was denied on April 19, 1971, 402 U.S. 913. At the end of 1971, the present application was brought.

Following preliminary consideration of petitioner's *pro se* papers and the State's responses, this court concluded that the state court decision on voluntariness did not rest upon the kind of "adequate" findings that could preclude (or, perhaps, from the stance of this busy trial court, the word is "obviate") an evidentiary hearing in this proceeding. See 28 U.S.C. § 2254(d)(3). The governing principles are familiar now. As was declared in *Townsend* v. *Sain*, 372 U.S. 293, 315-16 (1963):

> "* * * Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a

> difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held."

See also *Cooper* v. *Picard,* 428 F.2d 1351, 1353-54 (1st Cir. 1970); *Stotts* v. *Perini,* 427 F.2d 1296, 1297-99 (6th Cir. 1970); *Outing* v. *State of North Carolina,* 344 F.2d 105, 106-07 (4th Cir. 1965). This court cannot be "reasonably certain" what facts of possibly coercive or stressful impact the trial judge found from the disputed testimony. The question of constitutional law, though it is easily stated, is surely a "difficult" one, calling for an informed synthesis of the "totality of the circumstances," *Clewis* v. *Texas,* 386 U.S. 707, 708 (1967). As will appear, in this court's ultimate view, it is necessary, even if only some of petitioner's factual assertions are accepted, to grant the relief he seeks.

Having determined that there must be an evidentiary hearing, this court assigned counsel for petitioner. Three witnesses were heard—the petitioner and the two detectives to whom he had confessed. It was agreed, reserving as to questions of relevancy and materiality, that this court, like the state court, could range through the entire state record in addition to assessing the further record made here. Now, having studied the several chapters of record and the able briefs, the court announces the following findings and conclusions upon which the writ petitioner seeks will be granted.

Born in Italy 27 years before the murder of his wife, petitioner had a fourth-grade education in his native land.

He was a dull student and was forced to quit school when he was 13 or 14. After some years of farm work, he came to the United States with his father in 1956. Seven years later, at the time of the crime, he could not read or write English, and he spoke and understood it poorly—"just enough to get by."

Shortly after his immigration, petitioner obtained a job as a lamp caster at which he worked until an accident in October 1962 resulting in a severe back injury. As has been noted, he was still in treatment for this disabling injury in the following March, suffering stiffness and pain which are among the factors, though not critical in themselves, underlying the decision announced herein.

Antedating his back injury, petitioner had a history of seizures of some sort. The episodes would begin with neck and stomach pains becoming increasingly severe, culminating in seemingly convulsive states. He also suffered occasional lapses of memory, leaving blanks covering periods of a few hours or so. He claims to have suffered such a lapse a few days before March 9, 1963, and at a more critical time in the early hours of March 10. This court gives only limited credence, but some weight, to this assertion.

In November 1961, petitioner married the young woman who was to be the victim scarcely more than a year later. He had no criminal record then or at any time before her death.

Beginning immediately after the death of his wife, petitioner was in a state of severe distress, tension and anguish. It makes no difference, of course, for our purposes whether his condition reflected, *inter alia,* his guilt or only innocent horror. It is sufficient that, from his own and other testimony in the record, petitioner has proved that he was in a state of severe agitation. In the words of a

disinterested bystander, he was "walking and hollering [and] crying" for some time after the explosion. He wept intermittently thereafter into the night and the following morning when his confessions were taken. He was dazed and bewildered much of the time. The nightmarish quality of the situation deepened as the afternoon passed. From about 1:00 to 4:00 p.m., petitioner was alternately seated on a nearby stoop, placed in a police patrol car, and allowed to talk with relatives who had come to the scene. He was questioned by a series of uniformed and plainclothes officers who came and went as the official investigation proceeded, and was eventually told, in response to his queries, that his wife was dead. During these three hours he was called upon to repeat several times his account of what had happened. Among other things, he told the police about threats he had received shortly before his marriage, warning him not to marry his fiancée. He stated that he had reported these warnings and his being a kidnap victim about three months prior to his wedding.

At about 4:00 p.m. petitioner was taken by the police to a Bronx station house, where he was to remain until a fateful trip to the morgue after 1:00 a.m. (and a confession there) followed by a return and further confession at 6:00 a.m. For most of the hours until midnight he was moved about from room to room of the police station and questioned by an array of officers, sometimes singly, sometimes in groups of two to three or five. For a while he was told to wait alone in the squad room. Then he was permitted to sit for 15 or 20 minutes with his mother, sister and brother, who lingered at the station until 9:00 or 10:00 p.m. Between 4:30 and 5:00 p.m. two detectives took him to a small room where varying numbers of detectives questioned him for an hour or an hour and a half. From there he was taken back to the squad room and

questioned for another hour, mainly by the chief inspector, but by others as well. Throughout these sessions, petitioner was asked to repeat his story over and over again, and he did so. The questioning by relays of officers continued, with brief interruptions, to the dramatic and sharply coercive reenactment hereinafter described.

Petitioner was not at any time through the night and the following morning told that he had a right to be silent, that his answers could be used against him, or that he had a right to counsel.

At 9:00 p.m. or so, an assistant district attorney, who was later to take the second confession, introduced himself and spoke briefly to petitioner. He noted petitioner's stiff gait and asked about it. Petitioner told him of his back injury and of his pending legal claim relating to it. He mentioned the name of his lawyer and expressed a wish that his lawyer were with him at this moment. The assistant told petitioner he knew the latter's attorney and thought him able.[1] The assistant was later to deny hearing the petitioner (in his broken English) state a desire to have the lawyer with him. There is no need to reject this denial. What is plain is that this prosecutor was not listenting intently for such an expression, either at this point or nearly twelve hours later when he led petitioner through a second confession. This court finds that petitioner made sufficiently clear so that government counsel should have understood his wish for the assistance of counsel.

Petitioner was, almost from the arrival of the police at the scene of the killing, a prime suspect. The location and rigging of the weapon in the car, to which only he and his wife had keys, the knowledge of the homicide squad members that many murders are family affairs, and the immediately evident questions raised by his account all led promptly to this focus upon him. Accordingly, while

he was not placed formally under arrest until much later, he was given to sense from his arrival at the station house that he was not free to leave. When he went to the bathroom, he was told to leave the door open. He was addressed, with regrettably common police etiquette and no request for leave, by an oddly abbreviated version of his first name ("Pat"), the arrogated familiarity serving in the circumstances as an expression of dominance and a show of force. By the time the assistant district attorney first encountered him, petitioner was being pressured, with sternness and displays of knowing skepticism, to "tell the truth" and abandon a story the officers treated as already demolished. He was being asked by 9:00 p.m. not merely "whether" but "how" he had rigged the murder weapon. He was being worn down by increasingly impatient and hostile rebuffs of his insistent and repeated denials.

At about 10 p.m. a television crew set up shop in the police station. Petitioner proceeded then to perform under the lights, telling his story once more for the 11 o'clock news. The chief inspector also made a statement for the television audience.

After continued questioning, with occasional interruptions, until midnight, three detectives took petitioner to the police garage to reenact the events immediately before his wife's death. Years later, at our hearing, he was to remember that a bright light was beamed at his eyes. The court does not credit this as recounted, but finds as an undisputed fact that the scene was well illuminated. Petitioner—suffering by now from acute back pains, headache, depleted blood sugar and depleted energy after long hours without food, and in an overall condition of wearied helplessness—proceeded to act out his story with detectives close beside him. When he had done, the questioners denounced his account as false and "impossible;"

they argued to him with loud hostility that he could not possibly have seen the "lump" he described behind the driver's seat from where he sat turning in the passenger seat.

At this point, petitioner testified, one of the detectives threatened to beat him if he did not confess. This testimony appears to have been truthful though not necessarily accurate. The court does not find that there actually was such a threat. The court does find that the petitioner, pitted against the hostile and accusing trio in the garage, and scarcely fluent in English under the best of conditions, understood that he faced a threat of violence. It takes little imagination to sense the quality of ominous and powerful antagonism in that midnight garage scene with petitioner arguing his fate against the angry incredulity of three police officers. Nevertheless, he held out for yet a while longer. The detectives continued to "balance" the tactic of threats with repetitions of the ostensibly solicitous suggestion, which had recurred throughout the evening, that petitioner would "feel better" if he told the truth.

At the end of the garage episode one of the detectives made the unusual offer to take petitioner to see his wife.[2] Petitioner accepted. Viewing h[illegible] wife's body, he began to weep once more, kissed her cheek and said he was "sorry." Then he confessed.[3] He related that he had resolved to kill her; had bought the shotgun at Sears, sawed it off at City Island, and rigged it in the fashion heretofore described. Having given this account, petitioner was brought back to the police station and questioned for a few more hours. A detective led him through the confession once again in much more detail, "making a thorough copy • • • of the entire conversation, and then shortly thereafter the Assistant District Attorney arrived and he took a statement.'"

*Decision of Frankel, D.J., Dated May 16, 1972, Granting Petitioner's Application for Habeas Corpus.*

It appears that the assistant district attorney arrived back at the station at 3:00 a.m. or so and was briefed by the police for several hours before taking petitioner's statement. The verbatim transcript of that statement—admittedly with no warnings of any rights to an ignorant immigrant in petitioner's circumstances—is a vivid reminder of how at least some of the people's lawyers were accustomed to deal back in 1963 with uncounseled criminal adversaries.[5] The transcript begins:

> "Question: My name is Norman Mordkofsky. I am an Assistant District Attorney. I am going to ask you a few questions and I would like truthful answers. Do you understand? Answer: Yes."

It goes on to extract from the petitioner a detailed case for the prosecution, culminating in "Yes, sir" answers to whether it has all been given voluntarily and after petitioner has been "treated properly."

It is pertinent that petitioner at this point had not slept and had eaten nothing for nearly 24 hours, since breakfast the day before. During the evening of March 9, his mother-in-law had given him half a container of coffee. He may have had coffee at another time during the night. He had been given water once or twice. He had been offered no food until long after midnight on March 9, and had felt neither free nor disposed to go get some for himself. On the return drive from his confession at the morgue, he was asked if he wanted a hamburger, and he declined. This testifies to the decency of the police. It does not suggest that petitioner was in good shape. Rather, it indicates a state of exhaustion, near breakdown, illness, extreme tension and resultant loss of appetite notwithstanding the need for food (to say nothing of rest) for effective functioning.

*Decision of Frankel, D.J., Dated May 16, 1972, Granting Petitioner's Application for Habeas Corpus.*

Upon the totality of the circumstances thus summarized, this court concludes that both confessions were unconstitutionally received in evidence against petitioner. Far from satisfying the State's burden of showing voluntariness by a preponderance, *Lego* v. *Twomey*, 404 U.S. 477 (1972), the evidence preponderates heavily the other way. It is not possible to conclude, as settled law requires, that petitioner confessed in the exercise "of a deliberate, sentient, and free choice, i.e., a rational intellect and a free will • • •." *United States ex rel. Castro* v. *LaVallee*, 282 F. Supp. 718, 723 (S.D.N.Y. 1968) (Mansfield, *J.*), collecting the cases. Rather, we have a case of a man of little education and poor understanding of the language;[6] racked with physical pain and psychological distress;[7] weakened by hunger and lack of sleep;[8] questioned for long hours by teams of vigorous and increasingly hostile officers;[9] not told of his rights to silence, counsel, etc.,[10] but given by tone and manner to understand that each questioner "has a right to, and expects, an answer";[11] shoved before television cameras after six hours or so of being moved about and assailed by his questioners in the police station; subjected to the coercion of a reenactment (including the forced placement of his hand into the seat back torn by the lethal pellets and wet with his late wife's blood) which he perceived with powerful reason as compulsory, hostile and ultimately damaging to his claims of innocence;[12] then, finally, overpowered by the macabre—if, fortunately, rare—stunt of a visit to the morgue, with pious explanations thereafter (see note 2, *supra*) that serve only to highlight the quality of relentless manipulation.[13] The denouement in the morgue, given its background, is far below the minimum process acceptable as due for the acquisition of evidence in a criminal case.

The later confession, at 6:00 a.m., is still worse, of course. Petitioner had been worn by further questioning, more

hours of hunger, sleeplessness and stress. His compliant self-incrimination cannot be deemed to have been "voluntary" in any relevant sense. The lawyer for the State, with a court reporter, took a detailed confession from a helpless man. No lawyer in petitioner's condition would trust himself at the closing of a sale of a corner kiosk. It is not permissible for a trained, alert prosecutor to use the fruits of such a confrontation as evidence.[14]

It follows that the petition must be, and it is, granted. Petitioner will be released unless the State, within thirty (30) days, brings his case on for a new trial. It is so ordered.

The court records its appreciation for the able and devoted labors of Allan Blumstein, Esq., as petitioner's assigned counsel.

Dated: New York, New York
May 16, 1972

MARVIN E. FRANKEL
U.S.D.J.

A true copy

JOHN LIVINGSTON, Clerk
By E. A. BEDAN
Deputy Clerk

*Decision of Frankel, D.J., Dated May 16, 1972, Granting Petitioner's Application for Habeas Corpus.*

FOOTNOTES:

[1] The attorney in question appeared the next morning for petitioner at his arraignment.

[2] One of the detectives who took petitioner to the morgue (it being conceded by his partner that this was an extraordinary action) was asked on cross whether this was done in the hope "that there would be an emotional impact which would cause him to change his story • • •." He answered:

> "No, I believe the reason that he did go to the morgue, I mean it was to, like say he was sorry to her, to tell her that he was sorry."

[3] From this point until some seven hours later, at 9:00 a.m. or so, petitioner claims to have "blacked out." That is, he swears he has no memory of the events of that period. The court has experienced great difficulty in making a precise finding on this subject. The whole account of losses of memory is among the less convincing aspects of what has seemed generally persuasive testimony by petitioner. On the other hand, the court has not found satisfactory the course of rejecting entirely this item of evidence. In the end, the most nearly acceptable view is that petitioner's memory of those hours is at best dim—and sufficiently repulsive to him that repression is by no means a course of outright dishonesty. At any rate, the topic does not appear to be of decisive importance. The narrative of events from here on follows the essentially consistent account given by prosecution witnesses.

[4] The quotation is from the detective's testimony in this court (Tr. 176).

[5] Compare the time-honored ethical inhibitions upon lawyers' dealings with adversary parties in the absence of counsel. And see *United States* v. *Four Star*, 428 F.2d 1406, 1407 (9th Cir.), cert. denied, 400 U.S. 947 (1970); *Schantz* v. *Eyman*, 418 F.2d 11, 13 (9th Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *Coughlan* v. *United States*, 391 F.2d 371, 376 (9th Cir. (Hamley, *J.* dissenting), cert. denied, 393 U.S. 870 (1968); *Mathies* v. *United States*, 374 F.2d 312, 316 (D.C. Cir. 1967); *Ricks* v. *United States*, 334 F.2d 964, 970 (D.C. Cir. 1964); *Lee* v. *United States*, 322 F.2d 770, 777 (5th Cir. 1963); *United States ex rel. Vanderhorst* v. *LaVallee*, 285 F. Supp. 233, 241 (S.D.N.Y. 1968), aff'd, 417 F.2d 411 (2d Cir. 1969), cert. denied, 397 U.S. 925 (1970).

[6] *Spano* v. *New York*, 360 U.S. 315 (1959); *United States ex rel. Castro* v. *LaVallee*, 282 F. Supp. 718 (S.D.N.Y. 1968).

[7] Cf. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); United *States ex rel. Williams* v. *Fay*, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915 (1965).

[8] Cf. *Davis* v. *North Carolina*, 384 U.S. 737, 746-747 (1966); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698, 701 (2d Cir.), cert. denied, 350 U.S. 896 (1955); *United States ex rel. Clayton* v. *Mancusi*, 326 F. Supp. 1366, 1371 (S.D.N.Y. 1971), aff'd Dkt. No. 71-1696 (2d Cir. January 12, 1972); *United States ex rel. Castro* v. *LaVallee, supra.*

[9] Cf. *Spano* v. *New York, supra* at p. 322; *United States ex rel. Burns* v. *LaVallee*, 436 F.2d 1352 (2d Cir. 1970), cert. denied, 402 U.S. 1012 (1971); *United States ex rel. Weinstein* v. *Fay*, 333 F.2d 815, 818 (2d Cir. 1964).

[10] The trial antedated *Miranda*, but the failure to tell petitioner his rights remains a weighty factor against the State on the issue of voluntariness. *Davis* v. *North Carolina, supra* at 740; *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Haynes* v. *Washington*, 373 U.S. 503, 510-11 (1963); *United States ex rel. Clayton* v. *Mancusi, supra* at 1369-70.

[11] *Culombe* v. *Connecticut*, 367 U.S. 568, 575 (1961).

[12] Cf. *United States ex rel. Burns* v. *LaVallee, supra.*

[13] Cf. *Spano* v. *New York, supra.*

[14] If the earlier confession at the morgue were held valid, the use of the later, fuller confession to the assistant district attorney would seem still to have been a fatal error in itself. Cf. *Haynes* v. *Washington*, 373 U.S. 503 (1963).

## Decision of Frankel, D.J., Dated February 25, 1972, Ordering an Evidentiary Hearing.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM

PRO SE

71 Civ. 5111

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UNITED STATES OF AMERICA ex rel. PASQUALE DELLE ROSE,

Petitioner,

—against—

J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility,

Respondent.

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FRANKEL, D.J.

This is a troublesome case. On evidence that seems to have been credited to some uncertain degree by the state trial judge, there appear to have been substantial assaults upon the integrity of petitioner's will. There were both psychological and physical factors of major kinds likely to impair clarity of thought, power to resist and the ability to think lucidly enough to decide in truly voluntary fashion whether or not to say incriminating things.

Both sides agree that the case has been through the procedural route required by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and that there is no occasion for further state action of the kind mandated for cases like *Sigler* v. *Parker*, 396 U.S. 482 (1970). The difficulty remains that there are

not adequate state *findings* of the historical facts. Judge Gellinoff reviewed the evidence, summarized petitioner's testimony, but neglected to say how far he credited—and to what extent, if any, he discounted or rejected—that testimony. Instead, the distinguished trial judge simply stated his conclusion that the confessions, "considering the totality of circumstances, * * * were, in all respects, voluntary and legally admissible * * *." With utmost deference, however, I could not conscientiously join in that conclusion if I were to find the facts to have been as petitioner's testimony portrayed them. And there is no way of knowing whether Judge Gellinoff based his ultimate conclusions upon such findings. In short, there is no "adequate" determination, 28 U.S.C. § 2254(d), of the issue relieving this court of the obligation to hear petitioner's constitutional claims.

With both parties and this court agreeing that petitioner has exhausted state remedies, and with the state findings insufficient to bar or excuse consideration of the merits here, it becomes necessary to set the matter down for an evidentiary hearing. This will be done with all convenient speed. Allan Blumstein, Esq., 340 Park Avenue, New York, New York 10022, has consented to accept assignment as petitioner's counsel. He is hereby given that assignment and the court's appreciation for this latest instance of such public-spirited service by him.

Dated: New York, New York, February 25, 1972.

MARVIN E. FRANKEL,
U.S.D.J.

## Decision of Gellinoff, J., Dated October 10, 1968, After a Huntley Hearing.

SUPREME COURT,

BRONX COUNTY.

TRIAL TERM—PART XX

Ind. #345/1963

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

PASQUALE DELLE ROSE,

Defendant-Appellant.

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GELLINOFF, J.:

The defendant has been convicted of murder in the first degree and sentenced to life imprisonment. His trial and sentence on July 10, 1964, following a proceeding pursuant to Section 1045-A of the Penal Law, were concluded prior to the decision of the Supreme Court in Jackson v. Denno (378 U.S. 368) and of the Court of Appeals in People v. Huntley (15 NY 2d 72). Accordingly, I did not conduct any "Huntley" hearing on the voluntariness of defendant's confessions but I did permit a *voir dire* prior to admitting the confessions in evidence.

The defendant has appealed from his conviction, and, pending his appeal, the parties have stipulated that I conduct a "Huntley" hearing.

At that hearing the People rested on the trial record, which was received in evidence. The People called no wit-

nesses. The defendant also relied on the record, but, in addition, testified as a witness in his own behalf.

The evidence at the trial disclosed that the police responded at about 12:52 P.M., Saturday, March 9, 1963, to the front of premises 2224 Adams Place, Bronx, where the dead body of defendant's wife was found slumped behind the steering wheel of a parked automobile. She had died from a shotgun wound in the back. The shotgun had been rigged on the floor of the rear of the car, with the muzzle stuck in the back of the seat in which deceased was found. Defendant was sitting alongside her.

There are two confessions involved: one made to the police about 1:00 A.M. on March 10, 1963, following defendant's visit to the morgue to view the body of his wife, and the other to an assistant district attorney at about 6:00 A.M.

So far as the trial record is concerned, I find that both these confessions are voluntary and were legally admissible in evidence. Indeed, I so found at the trial and said so (Rec. p. 1256):

> "Should this matter come to an Appellate Court, if they feel that under the facts and circumstances of this case and under the evidence of the defendant's guilt, which this Court considers overwhelming, practically conclusive, some hearing is necessary to determine whether as a matter of law the confession was admissible, and pending a determination of that question, further disposition of the judgment which is about to be entered to be held in abeyance, that would be up to an Appellate Court. For the guidance of the Appellate Court, however, this Court states that, having presided at the trial having heard all the testimony pertaining to the making of the confession by this defendant, had this question been submitted to this Court as a preliminary question in the absence of the jury,

this Court would have ruled as a matter of law that this confession in this case, under the circumstances which it was obtained by the arresting authorities, was freely and voluntarily made and not, in this Court's opinion, in violation of the defendant's constitutional rights."

*The Trial Testimony*

The trial record discloses that the police left the scene of the crime on March 9th at about 5:00 P.M., at which time defendant was brought to the station house. He was not under any custody or arrest. At 9:00 P.M. he was not a suspect—he was only giving information. At midnight Detective O'Neil was informed by one of his superiors that defendant could go home, but O'Neil asked him to wait. Shortly thereafter, about 1:00 A.M., defendant, at his own request, was taken to the morgue. He cried and thereafter made a statement to the police. He later, at about 6:00 A.M., made a confession to the District Attorney, which was reduced to writing.

At the trial, defendant presented evidence that he had had a back injury, and therefore was in pain; that he was taken to the garage and asked to put his hand in the back seat where the blood of his wife was; that the police threatened to beat him up if he did not admit he killed her; that he was compelled to say by the police that he had killed his wife but that what he meant was that he had done so inadvertently, by placing his hand over the lump; and that, after telling the officer he wanted to see his wife, he did not remember what happened thereafter until 9:00 o'clock in the morning. He testified that he did not remember making the statement to the assistant district attorney at six o'clock in the morning, but "Yes, I could have, but if I did it is false; it is not true."

*Decision of Gellinoff, J., Dated October 10, 1968, After a Huntley Hearing.*

On defendant's behalf, a Dr. Richard H. Hoffman, a psychiatrist, testified that, although he did not believe defendant had been brainwashed, the defendant, in his opinion, was so exhausted "he would say yes if you asked him if the moon were made of green cheese".

The defendant admitted that his mother-in-law brought him coffee and that the police gave him a container of coffee; and the police testified that they had offered him food. The defendant himself admitted that he did not feel hungry and "wasn't thinking about eating"; and that during the time he was questioned by the police, the treatment of him "was good, yes".

*The Hearing Testimony*

The additional evidence furnished me at the hearing, consisting of testimony by defendant, is as follows:

1. Defendant explained that, when he re-enacted the scene in the garage at midnight, one of the detectives told him it was impossible for him to see the gun from where he was sitting; he, defendant, replied that it was not impossible, that I had not seen the gun but I had noticed a brown paper bag in the back of the car * * * and that's what attracted my attention and I looked further and noticed the lump in the car."

2. An officer then "threatened me. He said that if I didn't talk to them, if I didn't tell them the truth that they would beat me up and make me wish I was in my wife's place. I told him I got nothing else to tell him."

3. Detective O'Neil told him to put his hands in a hole in the front seat which the shot gun had made and that "my wife's blood was still there. He said, 'Touch, and feel it.'

And when I didn't, he took my hands and put it there himself."

4. They returned to the station house. Detective O'Neil asked him if he wanted to tell his wife's uncle what happened, and to tell a priest, but defendant said he didn't.

5. O'Neil asked him if he wanted to see his wife. "If we take you to see her will you tell us what happened? * * * So, I told I want to see her, I said, but I got nothing else to tell you." Then the detective left and he doesn't remember him coming back. The next thing he remembers was that he found himself sleeping on a bench and when he woke up he found himself handcuffed.

6. He denied any recollection of having made any statement to the assistant district attorney in the presence of a stenographer.

7. He explained his recorded answers to the assistant district attorney as follows:

(a) When he told the district attorney that he had decided to use a double-barreled shot-gun to kill his wife, it was because he had had a glimpse of the gun earlier that day:

> "I only took a look of it right after my wife's death when I got out of the car.
>
> Q. And were you able to identify at that time the type of gun * * * it was? A. Yes. At this time, although the gun was covered with a mat, there was about three or four inches on the top near the front seat on the back of the front seat and it made me notice that the type of gun it was.
>
> Q. Were you able to notice that it had two barrels? A. Right."

(b) When he told the district attorney that he had sawed off the stock and the barrels, it was because it had been called to his attention that the shotgun used to kill his wife had been sawed off.

> "It was sometime during the evening before midnight that day, one of the detectives, I can't recall which one it was, asked me 'Why did you saw off the gun?' He said, 'Didn't you know that the gun was sawed off and filed?' I said, 'I don't know what you're talking about.'"

(c) When he told the district attorney that he planned to have the gun go off "by pulling the seat", it was because "the chief himself at one time told me. * * * He said, 'Last night you went down and planted the gun in the car, knowing that your wife was going out this morning and the gun was supposed to go off when she pulled the seat but didn't go off and then you went there and pulled it yourself."

On cross-examination, the defendant testified:

> "Q. Now, Mr. Delle Rose, during this entire time that you were in the station house and outside the station house, how were you treated by the police? A. As far as I remember, they treated me right.
>
> "Q. In fact, wouldn't you say that you were treated very well by them? A. Well, I don't know what you mean by 'very well'. I say they treated me right.
>
> "Q. They treated you right. I don't know what you mean by 'right'. Did they treat you nicely? A. You made a question before they not beating me but they threatened me.
>
> "Q. But they treated you well, nobody hit you? A. All right.
>
> "Q. They were nice to you? A. That's right."

*Decision of Gellinoff, J., Dated October 10, 1968, After a Huntley Hearing.*

## Conclusion

On all evidence, both at the trial and at the hearing, and after considering the totality of circumstances, including the omission to warn defendant of his right to counsel and his right against self-incrimination, I find and decide that the respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible in evidence at the trail which was concluded by verdict on May 1, 1964, and by sentence on July 10, 1964.

Dated: October 10, 1968.